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August 5, 1980

SECRET

TO : L/NEA - Frank Willis
L/NEA - Tim Ramish

FROM : L/NEA - Tina A. Ravitz

SUBJECT : Facts and Issues on U.S.S. Liberty Incident -- In Anticipation of Negotiations with the GOI

I have reviewed the files of L/C and NEA/IAI on the U.S.S. Liberty, met with Fabian Kwiatek of L/C and David Korn and Ted Cubbison of NEA/IAI, and written a memorandum on the legal authority of the Department of State to negotiate the United States Government (USG's) claim against the Government of Israel (GOI) for damage to the U.S.S. Liberty during the 1967 war. This memorandum summarizes some of the more salient facts contained within those files and identifies possible problems that might arise during the course of negotiations.

I. Background

On July 1, 1968, the USG presented a claim for $7,644,146 to the GOI for damage caused by the Israelis to the U.S.S. Liberty during the 1967 war. The GOI immediately assumed responsibility for damaging the ship and took the initiative to offer to make amends for loss of life and material damage. Thirty-four (34) men were killed and from 160 to 170 were injured. The GOI renewed its offer to make amends in diplomatic notes to the Secretary of State on June 10 and 12, 1967.

The Israeli government paid, within a few months of the incident, $3,323,500 in full and final settlement of the thirty-four (34) death claims. In 1969, the GOI also paid $3,452,275, the total amount claimed for personal injuries. As yet, though, the GOI has not paid the $7.6 million that the USG claimed for damage to the ship.*

*According to a letter of August 23, 1977, to Senator Stevenson from D.J. Bennet, Jr., Assistant Secretary for Congressional Relations, the GOI has fully discharged a small USG claim already. I do not know if this reference is to the private claims or to another governmental claim in connection with the incident. The only public claim I know of, though, is the one for $7.6 million for damage to the ship.

After receiving the USG's claim for $7.6 million, the GOI denied responsibility* but offered to pay $100,000, a nominal sum, in August 1971. The USG rejected the offer in September 1971 because it was a token and not a substantial offer of payment, because it bore no relationship to the amount of damage actually sustained, and because acceptance could have established an undesirable precedent. The USG did not "press" the GOI to settle until 1978, when both governments agreed to negotiate.

Possible Israeli arguments to disclaim liability run the gamut of the following: the ship was in a war zone which the United Arab Republic had warned neutral vessels to avoid; Israel was at war with Egypt; the ship was not sufficiently marked; and the USG was somehow negligent.

In response to these arguments, the USG can cite the findings of a Naval Court of Inquiry that investigated the incident. The Court of Inquiry concluded that the U.S.S. Liberty was in international water (in fact, at no time did the ship approach closer than 13.6 nautical miles to land) and properly marked as to name and nationality. Further, the Court found that there was ample opportunity for the Israelis to identify the Liberty, especially in light of the allegation that Israeli planes on three (3) separate occasions surveyed the ship. Witnesses suggested, though, that the U.S. flag (a normal-sized 5' x 8') may have been difficult for the attackers to see. Indeed, in an appendix to its findings, the Court noted that the Liberty might have been mistaken for the Egyptian supply ship El Quseir, despite only a superficial resemblance and a great disparity in size.

*I have seen a number of documents that say that the GOI denied liability, but I have also seen a number that say the GOI still recognizes its responsibility. This apparent inconsistency may be explained in a couple of ways. First, in a note of August 5, 1968, the Israeli Foreign Ministry wrote that it considered the GOI not liable for damage to the Liberty. Subsequently, Rabin asked if the USG would forget the August 5 note and proceed on the basis of status quo ante. The Department of State authorized the U.S. Embassy in Tel Aviv to return the note. (See outgoing telegram, September 13, 1968.) A second possible explanation is that the GOI is making a distinction between being "responsible" (i.e. acknowledging that they did damage the Liberty) and not being "legally liable" (i.e. not required under law to make reparations because, perhaps, of contributory negligence or assumption of risk).

II. Possible Problems

A. Amount Claimed -- At my meeting with Kwiatek, Korn, and Cubbison, of July 7, 1980, Korn indicated that the Department of the Treasury has suggested several different calculations to begin our negotiations with the GOI. One bargaining position was to ask for damages for the cost of repairing the Liberty if it were repaired today. Kwiatek indicated that the GOI must only pay the cost of repair at the time of the damage; and, at best, the USG could get interest on the money over the past twelve years. (The GOI may well raise as a defense on the issue of interest the fact that the USG has not "pressed" its claim for at least ten (10) years.)

One possible problem with the $7,644,146 figure the USG claimed from Israel on July 1, 1968, is its likely inaccuracy. In a correspondence of September 1, 1967, from the Commander of the Naval Ships System Command to the J.A.G., the estimated cost of restoring the ship was miscalculated as $5,424,202. This figure, correctly added, should have been $5,592,160. A more detailed inspection indicated that $2,070,698 more would be required, thereby bringing the miscalculated total to $7,494,900 ($5,424,202 + $2,070,698). The correct figure should have been $7,662,858 ($5,592,160 + $2,070,698). No one yet knows how the USG arrived at the $7,644,146 it claimed from the GOI. It should have been either $7,494,900 (based on the incorrect addition) or $7,662,858, a full $18,712 more than the amount claimed against the GOI. One problem with this discrepancy is that it highlights the fact that the U.S.S. Liberty was never restored, thus suggesting that any USG claim is at best conjectural and at worst grossly over-inflated.

B. Question of U.S. Negligence -- Apparently, the GOI has discussed the issue of "contributory negligence" before. See airgram of December 24, 1965, from the American Embassy in Tel Aviv to the State Department re: Eban's remarks to the Knesset re: alleged U.S. negligence. Adding fuel to this fire is the fact, known to the general public, that the USG had issued instructions to the U.S.S. Liberty to move out of the area. This action may suggest that the situation within the area involved unacceptable risk and that the USG was aware of the risk it took. Further, these instructions were delayed and never reached the ship, thus indicating that a possible U.S. "foul-up" enhanced the likelihood of the incident.

cc: L - Mr. Feldman
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